

NO. 82-1611

Office - Supreme Court, U.S.
FILED

APR 25 1983

ALEXANDER L. STEVAS,
CLERK

**In the
Supreme Court of the United States**

OCTOBER TERM, 1982

**NEW ORLEANS STEAMBOAT COMPANY
and
ROBERT E. LEE, INC.,**

Petitioners

VERSUS

**M/T EXXON BALTIMORE, ETC., ET AL.,
Respondents**

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**OPPOSITION BRIEF OF RESPONDENTS
EXXON CORPORATION AND
M/T EXXON BALTIMORE**

**GERARD T. GELPI
E. BURT HARRIS
BARRY L. LaCOUR
Gelpi, Sullivan, Carroll &
Laborde
934 One Shell Square
New Orleans, Louisiana 70139
(504) 524-9714**

Attorneys for Respondents

TABLE OF CONTENTS

	PAGE
Table of Contents	i
Table of Authorities	ii
Statement of the Case	1
Summary of Argument	6
Argument	6
Conclusion	9

TABLE OF AUTHORITIES

CASE	PAGE
<i>Berenyi v. Immigration Director</i> , 385 U.S. 630, 87 S.Ct. 666, 17 L.Ed.2d 656 (1967).....	7
<i>Graver Mfg. Co. v. Linde Co.</i> , 336 U.S. 271, 69 S.Ct. 535, 93 L.Ed. 672 (1949).....	7
<i>National Marine Service v. Barrios Bros.</i> , 188 F.Supp. 300 (E.D.La.), aff'd, 286 F.2d 573 (5th Cir. 1961).....	8
<i>O/Y FINLAYSON-FORSSA A/B v. Pan Atlantic Steamship Corp.</i> , 259 F.2d 11 (5th Cir. 1958)	8
<i>U.S. v. Johnson</i> , 268 U.S. 220, 45 S.Ct. 496, 69 L.Ed. 925 (1925).....	7

STATEMENT OF THE CASE

This case involves a collision in the Lower Mississippi River beneath the Greater New Orleans Bridge [hereinafter GNO Bridge] at approximately 1634 hours on March 29, 1980, when the downbound steamer NATCHEZ struck the upbound tanker EXXON BALTIMORE.

On the afternoon of March 29, 1980, the EXXON BALTIMORE, under the control of licensed New Orleans-Baton Rouge Pilot T. J. Pizani, was proceeding upriver, laden with a cargo of crude oil, bound for the Exxon refinery in Baton Rouge, Louisiana. In addition to her licensed pilot, the EXXON BALTIMORE, 743 feet in length and drawing approximately 39 feet, was manned by Master John Spear, with qualified deck and engine room officers and crew standing their assigned watches.

All navigational equipment aboard the EXXON BALTIMORE was operational and properly in use prior to and at the time of collision (Trans. pp. 776-77, 799), as the tanker proceeded upriver, stemming the current of 5 miles per hour (M.P.H.), favoring the left descending (New Orleans) bank (Trans. p. 800) in an area of intermittent rain squalls and thunderstorms.

The EXXON BALTIMORE had been brought upriver from the Gulf of Mexico by a Crescent River Pilot, who was properly relieved by Capt. Pizani for the transit to Baton Rouge. (Trans. pp. 791, 814). After Pilot Pizani boarded the EXXON BALTIMORE, the vessel held up below Algiers Point because the Governor Nicholls Traffic Control Light (33 C.F.R. §161.401, *et seq.* (1980)) at Mile 94.3 AHP was red to upbound traffic. (Trans. p. 792). At 1613, the Governor Nicholls Traffic Control Light turned

green for upriver traffic and the Vessel Traffic Service Radio Communication (VTS) (Record p. 451) authorized the EXXON BALTIMORE to proceed upriver (Trans. pp. 793, 986); she was so bound when the NATCHEZ struck her while attempting to cross her bow to force an improper starboard-to-starboard passing.

At all times, the EXXON BALTIMORE was participating in the U.S. Coast Guard VTS, complying with all requirements of the Bridge to Bridge Radio Telephone Act (33 C.F.R. §26, *et seq.*); adhering to the Inland Navigation Rules for Harbors, Rivers, and Inland Waters, 33 U.S.C. §154, *et seq.*, and the Pilot Rules for Inland Waters, 33 C.F.R. §80, *et seq.*; maintaining both visual (Trans. pp. 1060, 1209) and radar lookouts (Trans. p. 809) and using VHF and UHF radios to monitor radio traffic and to communicate with other vessels (Trans. p. 778).

The NATCHEZ, 265 feet in length with drafts of only 5.5 feet forward and 6.5 feet aft (Record p. 452), heading downriver favoring the west or right descending bank (Trans. pp. 1112, 1113, 1117, 1149) for her berth at Toulouse Street, had had difficulty on her morning trip and on this afternoon voyage due to current, wind conditions and her lack of maneuverability. She was improperly proceeding downbound against the Governor Nicholls Traffic Control Light (Trans. pp. 944, 958, 961, 1157), while the EXXON BALTIMORE, as authorized, was proceeding upriver (Trans. p. 457). The NATCHEZ was not properly monitoring her radar (Record p. 469; Trans. p. 137), and was neither maintaining a proper radio watch nor then participating in the U.S. Coast Guard VTS. (Record p. 453; Trans. pp. 138-39).

When the NATCHEZ first was sighted by the

EXXON BALTIMORE, "the NATCHEZ was nearly head to head with the EXXON BALTIMORE" (Record p. 456), which *required* the port-to-port passing customarily effected by vessels meeting under the GNO Bridge (Trans. pp. 464, 490, 491, 732, 961, 1148, 1149, 1156). The EXXON BALTIMORE sounded one whistle for the port-to-port passing, which the NATCHEZ ignored. Shortly thereafter, the NATCHEZ sounded a two whistle blast (Record p. 457; Trans. pp. 474, 478, 951, 952, 1143, 1145), and radically altered her course to port, in violation of the Inland and Pilot Rules, toward the left descending bank, across the projected course of the EXXON BALTIMORE. (Record p. 457; Trans. pp. 953, 1117, 1149, 1188).

Upon hearing the NATCHEZ's two whistle signal, the EXXON BALTIMORE sounded the danger signal and again sounded one whistle for the required port-to-port passing. (Trans. p. 1146). Nevertheless, the NATCHEZ continued at her excessive speed across the projected course of the EXXON BALTIMORE.

Captain James Taylor, Jr., called to testify by the NATCHEZ, clearly observed (Trans. p. 491) that in an effort to give the NATCHEZ more room and time to make the port-to-port passing required by the Inland Rules, the EXXON BALTIMORE altered her course to starboard, bringing her as close as safely possible to the pier of the GNO Bridge near the left descending bank.

To maintain maneuverability and control in the swift current (Trans. pp. 841, 843, 1015), and because it was obvious the NATCHEZ, until almost the moment of impact, could turn to her starboard to effect the required port-to-port passing (Trans. p. 1165), the EXXON BALTIMORE did not and could not reduce speed (Trans. pp. 1166, 1179,

1181) or further alter her course until just prior to collision. Then, when it was certain the bow of the EXXON BALTIMORE would clear the bridge pier, her helm was put hard to port to swing her stern to starboard in an additional effort to clear the NATCHEZ in a proper port-to-port passing.

The NATCHEZ continued her collision course and excessive speed into the EXXON BALTIMORE's port side, striking the tanker approximately 70 feet aft of her stem. Actually, as the trial court found, had the EXXON BALTIMORE reduced speed at all, since the NATCHEZ maintained her improper course, the EXXON BALTIMORE's speed reduction would have caused her to strike the NATCHEZ broadside, rolling the NATCHEZ over or cutting her in half with disastrous consequences for her 377 passengers. (Record p. 472).

New Orleans Steamboat Company and Robert E. Lee, Inc. filed suit on April 28, 1980, against the M/T EXXON BALTIMORE and Exxon Transportation Co. to recover for damages sustained by the Steamboat NATCHEZ in its collision with the EXXON BALTIMORE. Exxon Corporation was substituted thereafter for Exxon Transportation Co. Exxon Corporation commenced suit against the Steamboat NATCHEZ, her engines, boilers, etc. and New Orleans Steamboat Company on May 6, 1980, seeking recovery for damages sustained in the same collision. The actions were consolidated on June 9, 1980, by order of the District Court.

Trial on the issue of liability only in this matter was held February 9-10, 12-13 and 19, 1981, before the Honorable Lansing L. Mitchell in the U.S. District Court for the Eastern District of Louisiana. The Court found the

improper navigation of the NATCHEZ "amounted to gross fault and was the major cause of the collision." (Record p. 464). Additionally, the Court concluded that the excessive speed of the Steamboat NATCHEZ and her failure to utilize her radar contributed to the collision. (Record pp. 468-69).

The trial court also concluded the EXXON BALTIMORE was travelling at an excessive speed and found this to be a proximate cause of the collision. (Record p. 467). In so finding, the Court stated the EXXON BALTIMORE had "failed to sustain its burden of proof that her excessive speed was not a contributing cause of the collision." (Record p. 468).

Having found both the EXXON BALTIMORE and the NATCHEZ at fault, the Court found the collision occurred as a result of "sixty percent (60%) fault on the part of the NATCHEZ and forty percent (40%) on the part of the EXXON BALTIMORE." (Record p. 474).

Notice of appeal to the U.S. Court of Appeals for the Fifth Circuit was subsequently filed by both the Exxon and NATCHEZ interests. Oral argument was heard before a panel of the Court on December 8, 1982. On December 27, the Court issued the following opinion: "Substantial credible evidence supports the findings of fact made by the district court. Affirmed. See Local Rule 21. *McAllister v. United States*, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20 (1954)."

A petition for rehearing filed by the NATCHEZ interests was denied, as was a suggestion for rehearing en banc, since no judge on the panel nor judge in regular service on the Court requested the Court be polled on rehearing en banc.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied since this matter does not concern the decision by a federal court of appeals in conflict with that of another federal court of appeals, does not involve a federal question decided in a way in conflict with a state court of last resort, nor has the U.S. Court of Appeals for the Fifth Circuit so far departed from accepting the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Additionally, this matter does not involve an important question of federal law which should be settled by this Court, nor does it involve a decision in which a federal question has been decided in a way in conflict with applicable decisions of this Court.

Quite simply, this Court is being asked by petitioners to change the percentages of liability as found by the district court and conclusively affirmed by the Fifth Circuit Court of Appeals. This is hardly a matter which justifies Supreme Court review.

ARGUMENT

Exxon will be brief in presenting to this Honorable Court the reasons why it should not grant the petition for writ of certiorari. The petitioners have presented three questions which they contend are matters of such grave concern that they must be decided by the U.S. Supreme Court, even though the U.S. Court of Appeals for the Fifth Circuit considered these same questions and, after careful consideration of the record below, concluded such questions merited only a one line decision. The "questions" of the petitioners, allegedly warranting Supreme Court review, are as follows:

(a) Whether a 36,000 ton tanker, fully loaded, can commit multiple statutory violations of the rules of the road, thereby threatening the safety of the City of New Orleans, without being found solely at fault for the consequences of its errors in navigation?

As was stated previously, following trial on the merits, the district court found that the NATCHEZ was sixty percent at fault and the EXXON BALTIMORE forty percent. This finding was affirmed by the Fifth Circuit Court of Appeals. The petitioners suggest to this Court that it is of national importance that the percentages be somewhat altered, although they present no legal arguments for such.

In essence, petitioners are asking this Court to review factual findings already carefully reviewed. As was stated in *U.S. v. Johnson*, 268 U.S. 220, 227, 45 S.Ct. 496, 497, 69 L.Ed. 925, 926 (1925), the Supreme Court does not "grant a certiorari to review evidence and discuss specific facts." Particularly where the appellate court has affirmed the district court's finding of fact, "[a] court of law, such as the court is, rather than a court for correction of errors in fact finding, cannot endure taking to review concurrent findings of fact by two courts in the absence of a very obvious and exceptional show of error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275, 69 S.Ct. 535, 538, 93 L.Ed. 672, 677 (1949), quoting other cited cases; *Berenyi v. Immigration Director*, 385 U.S. 630, 635, 87 S.Ct. 666, 670, 17 L.Ed.2d 656, 661 (1967); Fed. Rules Civ. Proc., Rule 52.

*

*

*

(b) Whether a district court is allowed to deduct the speed of the current of the river from the speed through the water of an upbound ship and add it to the speed of the

downbound ship so that both can be said to be navigating at the same speed, when established case law of the Fifth Circuit prescribes otherwise?

Once again, petitioners are urging this Court to review a finding of fact made by the district court and affirmed by the Court of Appeals. Such a question does not rise to a level requiring the Supreme Court's supervision.

Addressing briefly the "merits" of this question, petitioners urge the Fifth Circuit erred by not finding erroneous the District Court's calculations of speed for the respective vessels. In support of their argument, the *NATCHEZ* cites *O/Y FINLAYSON-FORSSA A/B v. Pan Atlantic Steamship Corp.*, 259 F.2d 11 (5th Cir. 1958).

A careful reading of this decision, and the cases cited therein, will show that they lend support to the district court's method for calculating speed. In fact, even Arthur Darden, called to testify as an expert at trial by the petitioners, calculated the EXXON BALTIMORE's speed by using that same formula as used by the district court, affirmed by the Fifth Circuit, and now criticized by the petitioners. (Trans. pp. 574, 575, 584, 589). See also *National Marine Service v. Barrios Bros.*, 180 F.Supp. 300 (E.D.La.), aff'd, 286 F.2d 573 (5th Cir. 1961).

*

*

*

(c) Whether a bridge bell book entry and radio message, both given simultaneously at the moment of collision, can be subsequently altered to reflect an opposite statement?

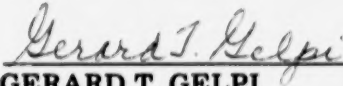
The question of the "alteration" of the bell book was adequately addressed in the district court's opinion, which

opinion was affirmed by the Fifth Circuit. The petitioners are simply attempting to create a factual situation which did not exist. This question merits no further response from respondents, and certainly does not merit the attention of this Court.

CONCLUSION

In summation, none of the questions raised by the petitioners in their Petition for Writ of Certiorari are such that they require review by this Honorable Court. These questions reflect only the petitioners' disagreement with the "facts" as found by the District Court, and affirmed by the Fifth Circuit, which found substantial credible evidence to support such.

RESPECTFULLY SUBMITTED:



GERARD T. GELPI
E. BURT HARRIS
BARRY L. LaCOUR

and

GELPI, SULLIVAN, CARROLL
& LABORDE
934 One Shell Square
New Orleans, LA 70139
Telephone: (504) 524-9714
Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing brief were served upon New Orleans Steamboat Company, Robert E. Lee, Inc., and the Steamboat NATCHEZ by mailing the same to its counsel, Harvey G. Gleason, Chaffe, McCall, Phillips, Toler & Sarpy, 1500 First NBC Building, New Orleans, Louisiana 70112, this 22nd day of April, 1983.

Gerard T. Gelpi
GERARD T. GELPI